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In the Supreme Court of the United States.

OCTOBER TERM, 1915.

UNITED STATES, PLAINTIFF IN ERROR,
v.
DENNIS QUIVER.

No. 682.

IN ERROR TO THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF SOUTH DAKOTA.

BRIEF FOR THE UNITED STATES.

STATEMENT OF THE CASE.

This is a writ of error to the District Court of the United States for the District of South Dakota, brought under the criminal appeals act of March 7, 1907 (37 Stat. 1246), to review the decision sustaining a demurrer to an indictment against Dennis Quiver, an Indian, for adultery committed on the Pine Ridge Reservation in the State and District of South Dakota. The offense of adultery when committed upon any place within the exclusive jurisdiction of the United States is defined and penalized by section 316, Criminal Code, and is prosecuted in this case under section 2145, Revised Statutes, extending the general laws of the United States as to the punishment of crime to

the "Indian country." The indictment was based upon these two statutes. Besides these, the other statutes construed by the court were section 2146, Revised Statutes, and sections 328 and 329, Criminal Code. The demurrer presented two grounds of defense, viz:

(*a*) That the court did not have jurisdiction of the alleged offense charged in the indictment;

(*b*) That the indictment did not state facts sufficient to charge the defendant with the commission of a public offense against the laws of the United States.

The court sustained the demurrer, basing its decision upon the consideration and construction of the statutes cited *supra*. (Rec., pp. 5, 6.)

INDICTMENT.

The charging portion of the indictment reads (Rec. p. 4):

> That Dennis Quiver, an Indian, late of the Pine Ridge Indian Reservation, in the State of South Dakota, in said district, heretofore, to wit, on or about the sixteenth day of January in the year of our Lord one thousand nine hundred and fifteen, with force and arms, at and upon the Pine Ridge Indian Reservation, in the State of South Dakota, and the district aforesaid, and within the exclusive jurisdiction of this court, did wilfully, knowingly, and feloniously have illicit voluntary sexual intercourse with one Jennie Whistler, an Indian, and a single woman, and her,

the said Jennie Whistler, did carnally know; the said Dennis Quiver being then and there a married man and then and there having a lawful wife alive who was a person other than the said Jennie Whistler, and the said Dennis Quiver and the said Jennie Whistler not being then and there lawfully married to each other, etc.

STATUTES INVOLVED.

Revised Statutes, section 2145:

> Except as to crimes the punishment of which is expressly provided for in this title, the general laws of the United States as to the punishment of crimes committed in any place within the sole and exclusive jurisdiction of the United States, except the District of Columbia, shall extend to the Indian country.
>
> (NOTE.—The crime of adultery was not a crime the punishment of which was "expressly provided for in this title.")

Revised Statutes, section 2146:

> The preceding section shall not be construed to extend to [crimes committed by one Indian against the person or property of another Indian, nor to] any Indian committing any offense in the Indian country who has been punished by the local law of the tribe, or to any case where, by treaty stipulations, the exclusive jurisdiction over such offenses is or may be secured to the Indian tribes, respectively.

Criminal Code, section 328:

> All Indians committing against the person or property of another Indian or other person any of the following crimes, namely—murder, manslaughter, rape, assault with intent to kill, assault with a dangerous weapon, arson, burglary, and larceny, within any Territory of the United States, and either within or without an Indian reservation, shall be subject therefor to the laws of such Territory relating to said crimes, and shall be tried therefor in the same courts and in the same manner and shall be subject to the same penalties as are all other persons charged with the commission of said crimes, respectively; and the said courts are hereby given jurisdiction in all such cases. And all such Indians committing any of the above named crimes against the person or property of another Indian or other person within the boundaries of any State of the United States, and within the limits of any Indian reservation, shall be subject to the same laws, tried in the same courts and in the same manner, and be subject to the same penalties as are all other persons committing any of the above crimes within the exclusive jurisdiction of the United States: *Provided*, That any Indian who shall commit the offense of rape upon any female Indian within the limits of any Indian reservation shall be imprisoned at the discretion of the court.

Criminal Code, section 316:

> Whoever shall commit adultery shall be imprisoned not more than three years; and when

the act is committed between a married woman and a man who is unmarried, both parties to such act shall be deemed guilty of adultery; and when such act is committed between a married man and a woman who is unmarried, the man shall be deemed guilty of adultery.

Judicial Code, section 24, paragraph 2:

The district courts shall have original jurisdiction as follows: * * *

Second. Of all crimes and offenses cognizable under the authority of the United States.

Criminal Code, section 329:

The circuit and district courts of the United States for the district of South Dakota shall have jurisdiction to hear, try, and determine all actions and proceedings in which any person shall be charged with the crime of murder, manslaughter, rape, assault with intent to kill, assault with a dangerous weapon, arson, burglary, or larceny, committed within the limits of any Indian reservation in the State of South Dakota. Any person convicted of murder, manslaughter, rape, arson, or burglary, committed within the limits of any such reservation, shall be subject to the same punishment as is imposed upon persons committing said crimes within the exclusive jurisdiction of the United States: *Provided,* That any Indian who shall commit the crime of rape upon any female Indian within any such reservation shall be imprisoned at the discretion of the court. Any person convicted of the crime of assault with intent to kill, assault with a dangerous weapon, or larceny, committed

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within the limits of any such reservation, shall be subject to the same punishment as is provided in cases of other persons convicted of any of said crimes under the laws of the State of South Dakota. This section is passed in pursuance of the cession of jurisdiction contained in chapter one hundred and six, Laws of South Dakota, nineteen hundred and one.

SPECIFICATION OF ERRORS.

(1) The District Court erred in holding, deciding, and adjudging that it did not have jurisdiction of the person of the defendant named or of the offense charged in the indictment.

(2) The District Court erred in holding, deciding, and adjudging that the indictment did not state a public offense against the laws of the United States. (Rec. p. 8.)

THE QUESTIONS INVOLVED.

The assignment of errors and the case present two questions:

(1) Has the United States District Court for the District of South Dakota jurisdiction under section 2145, Revised Statutes, of a prosecution for adultery committed by Indians upon an Indian reservation (situated within the boundaries of the State) and created out of the "Great Sioux" Reservation?

(2) Is the offense of adultery sufficiently defined in section 316, Criminal Code, to warrant the maintenance of a prosecution therefor in the District Court of the United States?

SUMMARY OF THE GOVERNMENT'S CONTENTIONS.

The Government contends that:

Section 316, Criminal Code, sufficiently defines and penalizes the crime of adultery when committed upon any place within the exclusive jurisdiction of the United States.

Section 2145, Revised Statutes, extends the general laws of the United States as to the punishment of crimes (among them adultery) to the "Indian country," and gives the United States courts jurisdiction.

The place where the indictment charges the offense under consideration to have been committed is "Indian country."

Section 2146, Revised Statutes, excepts from the operation of section 2145 (*a*) crimes committed by an Indian against the person or property of another Indian, (*b*) any offense committed by an Indian who has been punished by a local law of the tribe, and (*c*) any case where by treaty exclusive jurisdiction is or may be secured to the tribe.

Those exceptions are not applicable here, since adultery is not an offense against the person or property of any one (and there is no contention made in the case that the defendant has been punished by a local law of the tribe, or that jurisdiction is secured to the Indian tribunals by any treaty).

Section 328, Criminal Code, neither repeals nor supersedes section 2145, Revised Statutes, but rather enlarges its scope by impliedly repealing a part of the exceptions contained in section 2146.

Section 329, Criminal Code, further extends as to the State of South Dakota the scope of section 328, and necessarily can have no other or different effect upon section 2145, Revised Statutes.

It follows that the United States District Court for South Dakota has, and has always had, venue and jurisdiction under section 2145, Revised Statutes, and paragraph 2 of section 24, Judicial Code, to try the person and the offense charged in this indictment when committed upon the reservation here involved.

ARGUMENT.

I.

The United States District Court for the District of South Dakota has jurisdiction of a prosecution for the offense of adultery committed by Indians upon an Indian reservation (formerly a portion of the "Great Sioux" Reservation) located within the boundaries of the State and district.

(1) *Revised Statutes, section 2145, is still in force, and not repealed by section 328 of the Federal Penal Code, and gives to the Federal courts jurisdiction to try all crimes committed in Indian country except such specific crimes and class of crimes as are expressly excepted in said section and in section 2146.*

No question is raised as to the sufficiency of the indictment. The only point really involved under this proposition is whether the United States District Court for South Dakota has jurisdiction of the prosecution of Dennis Quiver, a Sioux Indian, under section 2145, Revised Statutes, for the offense of adultery,

as defined and penalized in section 316, Criminal Code, which was committed by him with a Sioux Indian woman upon the Pine Ridge Indian Reservation within the State and District of South Dakota.

The Pine Ridge Indian Reservation is a reservation duly established by the act of March 2, 1889 (25 Stat. 888), and is "Indian country" and was carved from the "Great Reservation" of the Sioux Nation in the Territory of Dakota by that act.

The District Courts of the United States have jurisdiction under paragraph 2, section 24, of the Judicial Code "of all crimes and offenses cognizable under the authority of the United States."

The United States District Courts have jurisdiction, therefore, under Revised Statutes, section 2145, over any offense established by the general laws of the United States (with exceptions not here material) when committed upon an Indian reservation within a State, subject, however, to the exceptions constituting Revised Statutes, section 2146. These exceptions are:

(*a*) Crimes committed by one Indian against the person or property of another Indian;

(*b*) Cases where the defendant has been punished by the local law of the tribe;

(*c*) Any case over which exclusive jurisdiction has been or may be secured to the tribes by treaty stipulations.

As to exception (*b*), the Government understands that no claim was made in argument in the court

below, or is now made here, that the defendant at bar has been punished by the local law of the tribe; and this court may prætermit this question, as it did in *In re Mayfield* (1891), 141 U. S. 107.

As to exception (*c*), the Government also understands that no claim was made in argument in the court below, or is now made here, that jurisdiction over this crime was secured to the tribe by treaty; and this court may, therefore, also prætermit this question. In the case of *In re Mayfield, supra*, the court found that by treaty stipulations with the Cherokee Tribe of Indians therein involved, the exclusive jurisdiction over all offenses was secured to the Indian tribe or nation by special treaty. In the case at bar no treaty with the Sioux Indians did, in fact, secure that tribe the right to punish the crime of adultery committed by one Sioux with another Sioux. See *Ex parte Crow Dog* (1883), 109 U. S. 506, 507. While there is a "Court of Indian offenses" on the Pine Ridge Reservation (sections 584–591, *Regulations of the Indian Office*, approved by the Secretary of the Interior March 1, 1904), established presumably under the power of regulation and supervision conferred upon the Secretary of the Interior, the Commissioner of Indian Affairs, and the President, respectively, by Revised Statutes, sections 441, 463, and 465, such courts are given jurisdiction to try misdemeanors only; adultery, however, is not a misdemeanor (Federal Penal Code, sections 316, 335); the case of *United States* v. *Clapox* (1888), 35

Fed. 575, is inapplicable, therefore, as being based on the idea that adultery was a misdemeanor.

The questions argued in the court below in the case at bar, and on which the court apparently rendered its decision, therefore, are confined to the following:

(1) Is the offense of adultery sufficiently defined in section 316 of the Federal Penal Code?

(2) Does section 329, Federal Penal Code (being a special statute applicable to the District Court of the United States for the District of South Dakota), limit or restrict that court in the exercise of the general jurisdiction possessed by all United States District Courts under Judicial Code, section 24, paragraph 2, and under Revised Statutes, section 2145?

(3) Was adultery, in the case at bar, an offense "against the person or property of another Indian"?—i. e., was adultery included with the exception to the jurisdiction of the Federal courts contained in Revised Statutes, section 2146?

The Government will consider these three questions in the reverse order.

Preliminary consideration must, however, be given to the precise application of Revised Statutes, sections 2145 and 2146, and their relation to Federal Penal Code, section 328 (formerly the act of March 3, 1885).

As stated *supra*, by the provisions of Revised Statutes, sections 2145 and 2146, the United States courts had jurisdiction to try offenses established by the general Federal laws when committed on Indian res-

ervations within a State, with the exception of crimes by an Indian against the person or property of another Indian (and the other exceptions not now material in the case at bar). The principle contained in these sections dates back to the original act of June 30, 1834, chapter 161 (4 Stat. 729), "An act to regulate trade and intercourse with the Indian tribes and to preserve peace on the frontiers," section 25 of which was as follows:

> That so much of the laws of the United States as provides for the punishment of crimes committed within any place within the sole and exclusive jurisdiction of the United States, shall be in force in the Indian country: *Provided*, The same shall not extend to crimes committed by one Indian against the person or property of another Indian.

In 1883, the case of *Ex parte Crow Dog*, 109 U. S. 556, held that the murder of an Indian by another Indian on the Sioux Reservation in the Territory of Dakota could not be prosecuted in the Territorial court sitting as a district court of the United States. The Court says (p. 570):

> It must be remembered that the question before us is whether the express letter of section 2146 of the Revised Statutes, which excludes from the jurisdiction of the United States the case of a crime committed in the Indian country by one Indian against the person or property of another Indian, has been repealed. If not, it is in force and applies to the present case;

and it was held that Revised Statutes, section 2146, was in force and that the Federal court had not jurisdiction.

Thereupon, the act of March 3, 1885, was passed, which removed from the exceptions made in Revised Statutes, section 2146, seven specific crimes "against the person or property of another Indian," viz, murder, manslaughter, rape, assault with intent to kill, arson, burglary, and larceny, and made these seven specific crimes, even when committed by an Indian against an Indian, prosecutable in the Federal courts. To this extent the statute nullified the *Crow Dog* case. *United States* v. *Kagama* (1886), 118 U. S. 375, 383; *Donnelly* v. *United States* (1913), 228 U. S. 243, 270. See also remarks in Congressional Record, vol. 16, pp. 935, 2385, 2533.

But neither the exceptions contained in the original act of 1834, nor in Revised Statutes, section 2146, nor the modifications of those exceptions contained in the act of March 3, 1885 (now embraced in section 328 of the Federal Penal Code), had any reference to any form of crime other than "crimes against the person or property." As to every other crime and class of crime, the general provisions of Revised Statutes, section 2145, were and are still in force, and effective to vest jurisdiction in the Federal courts.

Nothing in the present statutory law limits in any way the general jurisdiction of Federal courts under Revised Statutes, section 2145, over crimes com-

mitted in the Indian country when such crimes do not come within the class of crimes specified in Revised Statutes, section 2146, as crimes "against the person or property of another Indian" [or when they do not come within the class of crimes specified in exceptions (*b*) and (*c*), *supra*, contained in Revised Statutes, section 2146, which exceptions as above noted are not material in the case at bar.

The only limitation to Revised Statutes, section 2145, is that contained in decisions of this Court in the *McBratney* (104 U. S. 621), *Draper* (164 U. S. 240), and *Donnelly* (228 U. S. 243) cases. Under these decisions, this section is held not to apply to crimes committed by one white man against another in Indian country, within a State. This limitation, of course, has no application in the case at bar.

The single question, therefore, for decision by this Court on this branch of the case is: Is adultery a crime against the person or property?

The Government maintains that this question is no longer open, since the decisions of this Court in the *Bassett* (137 U. S. 496) and *Mayfield* (141 U. S. 107) cases.

(2) *Adultery is not an offense against the person or property of any person; and is not included within exception* (*a*) *supra. Jurisdiction over the adultery committed in the Indian country in the case at bar, therefore, vested in the Federal Court under Revised Statutes, section 2145.*

Bassett v. *United States* (1890), 137 U. S. 496, 506:

> Polygamy and adultery may be crimes which involve disloyalty to the maritial relation, but they *are rather crimes against such relation than against the wife;* and, as the statute speaks of crimes against her, it is simply an affirmation of the old familiar and just common law rule. We conclude, therefore, that under this statute the wife was an incompetent witness as against her husband.

In *In re Mayfield* (1891), 141 U. S. 107, reviewing a conviction in the District Court of the United States for the Western District of Arkansas, for adultery committed in the Indian Territory by an Indian with a white woman, the Court said (p. 112):

> The crime charged in this case was evidently not one committed by one Indian against the person or property of another Indian. * * *

And (p. 113):

> The party with whom the adultery is claimed to have been committed is not an adverse, but a consenting party. Nor is there any evidence before us that the prosecution was instituted by the wife of Mayfield, if the crime of adultery could be considered as committed against her. *Bassett* v. *United States*, 137 U. S. 496, 506.

It is true that the actual decision of the *Mayfield case* was to the effect, as stated in the headnote, that "a member of the Cherokee Nation committing adultery with an unmarried woman within the limits of the Territory is amenable only to the courts of the

Cherokee Nation"; but this Court based its decision on the fact that under the treaties with the Cherokees and under the special act of Congress of May 2, 1890 (26 Stat. 81), the courts of the Cherokee Nation had exclusive jurisdiction of "all civil and criminal cases arising in the country in which members of the nation by nativity or by adoption shall be the only parties."

There is no such treaty or special statute in the case at bar relating to the Sioux Indians.

(3) *The enactment of the statutes incorporated in sections 328 and 329, Criminal Code, neither expressly nor impliedly repealed or superseded the provisions of section 2145, Revised Statutes.*

It has been contended, however, that sections 328 and 329, Criminal Code, repeal or supersede section 2145, Revised Statutes, so far as Indian reservations are concerned.

Section 328 virtually embodies the provisions of section 9 of the act of March 3, 1885 (23 Stat. 385), adding, however, to the several offenses previously enumerated in the original act "assault with a dangerous weapon." This section confers jurisdiction upon the United States district courts of the eight enumerated offenses (among which adultery is not included) *when committed by an Indian upon the person or property of another Indian or other person* on an Indian reservation within the boundaries of a State.

In *Donnelly* v. *United States* (1913), 228 U. S. 243, the jurisdiction of the United States district court

in the prosecution of a white man for murder of an Indian upon an Indian reservation within the State of California was questioned. This Court said (pp. 269, 270):

> It is insisted by plaintiff in error that section 9 of the act of March 3, 1885, * * * which declares that "all such Indians committing any of the above crimes (including murder) against the person or property of another Indian or other person within the boundaries of any State of the United States, and within the limits of any Indian reservation, shall be subject to the same laws, tried in the same courts and in the same manner, and subject to the same penalties as are all other persons committing any of the above crimes within the exclusive jurisdiction of the United States"—constitutes the only legislation of Congress providing for punishing the crime of murder when committed upon an Indian within the limits of an Indian reservation. *The argument is that this act operated to repeal section 2145, Revised Statutes, which extended to the Indian country certain general laws of the United States as to the punishment of crimes. This argument is plainly untenable.* The act of 1885, of itself, provides for the punishment of crimes committed by Indians only. *So far from impliedly repealing section 2145, Revised Statutes, it manifestly repeals in part the limitation that was imposed by section 2146 upon the effect of section 2145.*

(4) *The enabling act of the State of South Dakota in nowise supersedes Revised Statutes, section 2145, so far as offenses committed by Indians upon Indian reservations within that State are involved; and section 329 of the Penal Code was enacted in order to broaden the scope of jurisdiction of the United States District Court for the District of South Dakota, and not to repeal the jurisdiction it already had under Revised Statutes, section 2145.*

> The authority of Congress to deal with crimes committed *by or against Indians* upon the lands within the reservation was not affected by the admission of the State of Washington into the Union (act of February 22, 1889, c. 180, 25 Stat. 676, 677; *Draper* v. *United States*, 164 U. S. 240, 242, 247; *Donnelly* v. *United States*, 228 U. S. 243, 271, 272);

United States v. *Pelican* (1914), 232 U. S. 442, 445.

Section 329, Criminal Code (act of February 2, 1903, 32 Stat. 793), is applicable to the State of South Dakota only, and as to that State broadens the scope of section 328 *so as to make it applicable, not only to Indians, but to all other persons,* committing the eight enumerated offenses against the person or property of an Indian or other person upon an Indian reservation.

Section 329 was not intended to limit the jurisdiction of the District Court for South Dakota to the eight enumerated crimes and to exclude it from the trial of any other crime. As stated in the statute itself, "This section is passed in pursuance of the

cession of jurisdiction contained in chapter one hundred and six, Laws of South Dakota, nineteen hundred and one." (See *Hollister* v. *United States* [1906], C. C. A., 8th Cir., 145 Fed. 773, 777.) The only cession of jurisdiction necessary to be made by the State was the cession of jurisdiction over crimes committed by white men in the Indian country; for over crimes committed by Indians on an Indian reservation the United States would have jurisdiction irrespective of any cession by the State.

United States v. *McBratney* (1881), 104 U. S. 621;

Draper v. *United States* (1896), 164 U. S. 240;

Donnelly v. *United States* (1913), 228 U. S. 243.

See also *United States* v. *Ewing* (1891), 47 Fed. 809.

See the reasons for the enactment of the act of 1903 as presented in the report of the Committee on the Judiciary, Fifty-seventh Congress, first session, H. R. Report No. 2704, June 26, 1902.

Hence, the act of 1903, now Federal Penal Code, section 329, was passed for the purpose of vesting the United States District Court for South Dakota with the additional jurisdiction thus ceded. Under section 328 (or the act of 1885, as the statute then was) it already had jurisdiction to try "Indians committing against the person or property of another Indian or other person" eight specified crimes. Under section 329 it was given the additional jurisdiction to try

"any person" charged with any of the eight specified crimes. The report of the committee submitting the bill shows that the original intention was to make it an amendment to the act of 1885, but it finally was drafted as a separate act. Under Revised Statutes, section 2145, it still retained the jurisdiction possessed by all other United States District Courts to try all crimes committed in the Indian country not included in the exceptions contained in Revised Statutes, section 2146.

II.

The offense of adultery is sufficiently defined in section 316, Criminal Code, upon which the indictment is based.

Section 316 of the Criminal Code provides:

> Whoever shall commit adultery shall be imprisoned not more than three years; and when the act is committed between a married woman and a man who is unmarried, both parties to such act shall be deemed guilty of adultery; and when such act is committed between a married man and a woman who is unmarried, the man shall be deemed guilty of adultery.

The word adultery, as signifying, primarily, illicit sexual intercourse, and, secondarily, violation of the marriage vow of one or the other, or both parties, has, and has always had, a definite and determinate meaning. It was known and denounced, by name only, in the Jewish law (*Ex.* 20, 14; *Levt.* 20, 10; *Deut.*

5, 18); in the Roman law (*Ayliffe, Parergon Juris Canonici Anglicani*, pp. 42, 43); in the Ecclesiastical Law of England (*Tucker's Blackstone*, book 4, p. 65, par. XI; *Ayliffe Parergon*, etc., p. 43; *Godolphin's Abridgment of Ecclesiastical Laws*, p. 469); and under the common law of England relating to private wrongs (*Tucker's Blackstone*, book 3, p. 139, par. 2, and note).

So, in the statutes of the Colonies:

Massachusetts.—In the *Laws of the Colony of New Plymouth* (1623–1691), under the head of "Offenses capitall," adultery is included as a "Capitall offense lyable to death."

Under the *General Laws of New Plymouth*, revised in 1658, adultery is still denounced by name only.

In the earliest statute of the colony of Massachusetts (1641), (*Hutchinson's Manuscript*, p. 38), it is provided: "that any person who committeth adultery with a married or espoused wife shall be surely put to death."

In the province laws (*Acts and Resolves of the Province of Massachusetts Bay*, v. 1, p. 171), section 2, chapter 5, passed June 6, 1694, provides: "And if any man shall commit adultery, the man and woman that shall be convicted of such crime," etc.

Quincy's Massachusetts Reports (1761–1772), page 258, contains a charge given to the grand jury by the Chief Justice in 1768. He said: "Our Ancestors, Gentlemen, when they came over to this Country, brought with them the Common Law of our Mother Country (which is with great Propriety so called), and, al-

though their first Charter bound them down to make no Laws contrary to the Law of England, yet, from the Situation they were then in, and from their peculiar Circumstances, they then apprehended they had a Right to adopt the Judicial Laws of Moses which were given to the Israelites of Old. They, at that Time, considered, not how Crimes affected the Peace and Harmony of Society, but, almost always adapted their Punishment to the real Guilt of the Criminal. Thus, they punished Adultery with Death."

Connecticut.—Connecticut Code of 1650: A compilation of the earliest laws and orders of the General Court of Connecticut (p. 28).

"8. If any person committeth adultery with a married or espoused wife, the adulterer and the adulteress shall surely bee put to death."

The General Laws and Liberties of Connecticut Colonie, Revised and Published by Order of the General Court held at Hartford, in October, 1672, provided (p. 2):

"Adultery: * * * That whosoever shall commit adultery with a married woman; or one betrothed to another man, both of them shall be severely punished," etc.

Rhode Island.—The earliest statute of the colony of Rhode Island, passed in 1647 (*Rhode Island Colonial Records*, v. 1, p. 173), provided: "Adultery is declared to be a vile affection, whereby men do turn aside from ye naturall use of their own wives, and do burn in their lusts towards strange flesh." It was made punishable by the same penalty as the

wisdom of the State of England might have or appoint therefor. The wisdom of the State of England at this time punished the offense only under the ecclesiastical law. The act of incorporation of the Providence Plantation specifically adopted the common law of England (ib. 158, 159) for the correction of crimes including (p. 159, par. 3) "Adultery."

Maryland.—The earliest statute of Maryland upon the subject of adultery appears to have been enacted in 1715 (*Abridgment of the Laws of Maryland* [Bisset, 1759], p. 49). It declared that "whoever entertained, provided for, or caused to be entertained, any lewd woman, after admonition by the minister or church warden of the parish where such person resided, shall be adjudged a fornicator or adulterer," etc.

New Hampshire.—The first provincial law of New Hampshire, passed in 1679 (*Laws of New Hampshire*, v. 1, p. 15) provided that "whosoever shall commit adultery with a married woman, or one betrothed to another man," shall be punished, etc.

Pennsylvania.—*The Duke of Yorke's Book of Laws*, dated September 22, 1676, provided (p. 63) that in cases of "adultery" all proceedings shall be according to the laws of England, "which is by divorce (if surd), corporal punishment, or fine and imprisonment."

The grand jury for the town and county of Philadelphia, in its presentments of January 3, 1685, presented "Mary Leichfield so called for formerlie Committing adulterie with one Thomas Leitchfield under pretence of being

her husband." (*Pennypacker, Pennsylvania Colonial cases*, p. 73.)

New York.—Laws of the Colony of New York (1664–1719) provided (p. 21, par. 12): "12. Every marryed person or persons, who shall bee found or proved by Confession of partyes, on sufficient Testimony, to have committed Adultery with a marryed man, or woman, shall be put to death."

New Jersey.—The Acts of the General Assembly of the Province of New Jersey, printed in 1742 (chap. 2, p. 5), show the enactment by the General Assembly in 1704 of an act suppressing immorality, section 3 of which provides that every person "who shall be lawfully convicted of fornication or adultery," shall be fined and whipped.

Virginia.—What appears to be the earliest colonial statute of Virginia on the subject (*Hening's Statutes at Large*, v. 1, p. 240), which was enacted in 1642, simply denounces the crime of "adultery" by name. Subsequently the Grand Assembly of 1657–58 (ib. 433) enacted that parties guilty, among other crimes, of "adultery," should be held incapable of being a witness or holding public office, and upon conviction should suffer certain fines.

The chief difficulty in supplying an adequate definition of the offense has not been in arriving at its primary element, but has arisen in determining the parties who were guilty of violation of the marriage vow, under the secondary element.

Thus under the Roman law (*Wharton, Criminal Law*, 11 ed., sec. 2063):

> Adultery, by the Roman law, was confined to illicit sexual intercourse with a married woman, the woman and her paramour being principals in the offense. A married man, who had illicit intercourse with an unmarried woman, was not guilty of this specific crime. * * *

Under the ecclesiastical law of England (*Wharton, Criminal Law*, 11 ed., sec. 2064):

> Adultery, according to the definition thus established, is sexual connection between a man and a woman, one of whom is lawfully married to a third person; and the offense is the same whether the married person in the adulterous connection is a man or a woman. * * *

The primary significance of the word as designating illicit sexual intercourse has been so long and so well understood that further or more extended definition of that element of the offense is entirely unnecessary. The greatest difficulty which has arisen in the prosecution of persons charged with the commission of adultery, by name only, under the statutes of the several States, has been in determining what parties committing the basic act were guilty of a crime, some State courts adopting the Roman law, some the ecclesiastical law. That difficulty is wholly obviated in the present statute; it states in clear and definite terms precisely what parties engaging in the act of adultery, as that word is and has always been

understood, so far as the act itself is concerned, are guilty of an offense against the laws of the United States. There is no necessity for more specific statutory definition.

In *United States* v. *Smith* (1820), 5 Wheat., 153, considering the crime of piracy which was denounced by name only, as defined by the law of nations, and the objection that there was no sufficient definition of the offense, this Court said (p. 159):

> But supposing Congress were bound, in all the cases included in the clause under consideration to define the offense, still there is nothing which restricts it to a mere logical enumeration in detail, of all the facts constituting the offense. *Congress may as well define, by using a term of a known and determinate meaning, as by an express enumeration of all the particulars included in that term.*

That case is entirely in point here, so far as the necessity for a definition of the primary element of an offense against the public laws of the United States is involved.

It is established that there are no common-law crimes against the United States; that reference to the common law may be had for an adequate definition of a statutory crime if deemed necessary; and it is conceded that adultery was not an offense under the common law of England. It is insisted, however, that the statute sufficiently defines the offense when it specifically designates the parties who may be convicted of it.

If it should be insisted that a more exact definition of the offense (although unknown to the common law) should be given, this court has the power to give it.

United States v. *Kelly et al.* (1826), 11 Wheat., 416, 418:

> This case comes before the court upon a certificate of a division of opinion of the judges of the Circuit Court for the Eastern District of Pennsylvania, upon the following point assigned by the defendants as a reason in arrest of judgment, viz, "that the act of Congress does not define the offense of endeavoring to make a revolt, and it is not competent to the court to give a judicial definition of an offense heretofore unknown."
>
> This court is of opinion, that although the act of Congress does not define this offense, it is, nevertheless, competent to the court to give a judicial definition of it. * * *

While it is not essential in this case that the court give a judicial definition of the principal and primary element of the offense charged, clearly it would have power to do so, if deemed necessary; and, especially so, when that definition has come to us in uninterrupted form from the earliest days of any known or written law.

The Colonies, generally, adopted the definition of the ecclesiastical law as a part of the common law of this country.

Wharton, Criminal Law (11 ed.), section 2064:

> The Roman law being in this respect superseded, this definition (of the ecclesiastical law

of England) was accepted by every Christian State at the time of the colonization of America; and is no doubt part of the common law brought with them by the colonists of all Christian nationalities. That it corresponds with a sound judicial philosophy is illustrated by the fact that it is incorporated in the codes of the principal continental European States.

The soundness of this view is established by reference to the Colonial statutes, heretofore cited, denouncing and penalizing the offense, although not punishable under the common law of England.

Further discussion of this contention appears superfluous, save that it may be remarked that this is the first occasion since the enactment of the Federal statute denouncing adultery that the definition of the offense has been brought into question.

If the court below sustained the demurrer on the ground of supposed insufficiency of definition, it erred.

CONCLUSION.

The demurrer to the indictment was erroneously sustained upon either of the grounds presented, and the judgment below should be reversed and the defendant ordered to stand for trial.

Respectfully submitted.

CHARLES WARREN,
Assistant Attorney General.

FEBRUARY, 1916.

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BRIEF FOR THE DEFENDANT

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1916

No. 682

UNITED STATES, PLAINTIFF IN ERROR,

vs.

DENNIS QUIVER.

IN ERROR TO THE DISTRICT COURT FOR THE DISTRICT OF SOUTH DAKOTA.

A. G. GRAHAM, Redfield, South Dakota,
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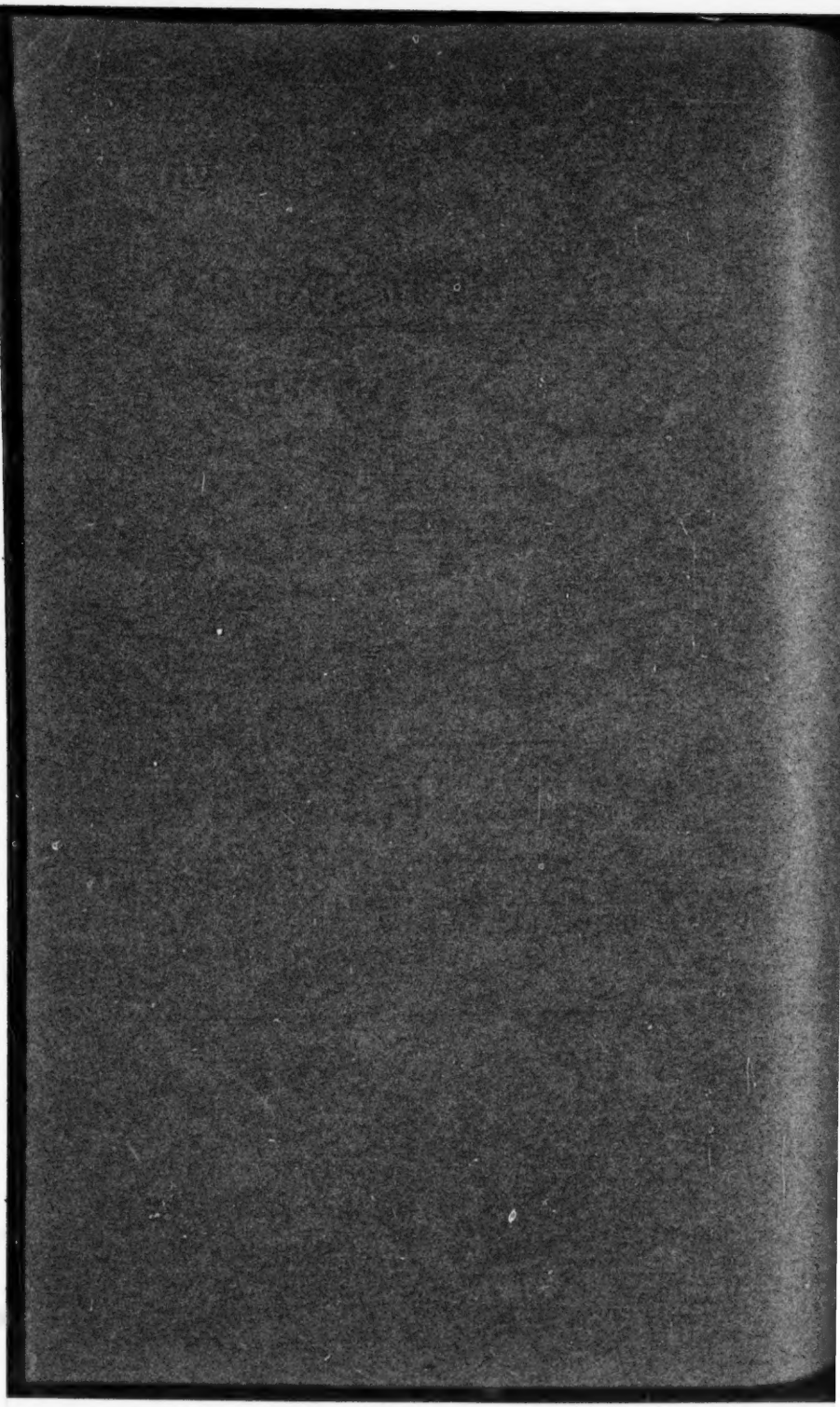
Attorneys for Defendant in Error.



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QUESTION INVOLVED.

The record presents the question, and in view of the course taken at the trial, it must be answered favorably to the Government, in order that the indictment may be sustained, that adultery committed between two Indians on an Indian reservation in the State of South Dakota, constitutes a crime against the laws of the United States.

SUMMARY OF DEFENDANT'S CONTENTIONS.

I.

THE DEFENDANT CONTENDS THAT IT HAS BEEN THE POLICY OF CONGRESS SINCE THE ORGANIZATION OF THE GOVERNMENT, TO GIVE TO THE COURTS OF THE UNITED STATES ONLY SUCH LIMITED JURISDICTION AS HAS BEEN CONFERRED UPON THEM FROM TIME TO TIME, BY ACT OF CONGRESS; AND SUCH JURISDICTION BEING LIMITED AND NOT EXCLUSIVE THAT ADULTERY BETWEEN INDIANS ON AN INDIAN RESERVATION IN THE STATE OF SOUTH DAKOTA, IS NOT SUCH A CRIME

AS WAS CONTEMPLATED BY THE ACTS OF CONGRESS; THAT IS TO SAY:

(a) THAT THERE IS NO STATUTE OF THE UNITED STATES WHICH MAKES ADULTERY BETWEEN INDIANS, ON AN INDIAN RESERVATION IN SOUTH DAKOTA A CRIME OR OFFENSE AGAINST THE LAWS OF THE UNITED STATES.

(b) THAT THE JURISDICTION OF THE UNITED STATES COURTS IS NOT EXCLUSIVE ON THE INDIAN RESERVATIONS IN SOUTH DAKOTA.

II.

SECTION 316 OF THE PENAL CODE LEAVES US TO LOOK ELSEWHERE FOR THE DEFINITION OF THE TERM ADULTERY. THE TERM ADULTERY HAS A DEFINITE AND FIXED MEANING AT COMMON LAW AND CONSISTED OF SEXUAL INTERCOURSE WITH A MARRIED WOMAN BY A MAN MARRIED OR SINGLE OTHER THAN HER HUSBAND.

III.

IF THERE IS ANY DOUBT AS TO WHETHER OR NOT ADULTERY BETWEEN INDIANS ON AN INDIAN RESERVATION IN THE STATE OF SOUTH DAKOTA CONSTITUTES A CRIME, THAT DOUBT SHOULD BE RESOLVED IN FAVOR OF THE DEFENDANT.

BRIEF OF ARGUMENT.

I.

THE DEFENDANT CONTENDS THAT IT HAS BEEN THE POLICY OF CONGRESS, SINCE THE ORGANIZATION OF THE GOVERNMENT, TO GIVE TO THE COURTS OF THE UNITED STATES ONLY SUCH LIMITED JURISDICTION AS HAS BEEN CONFERRED UPON THEM, FROM TIME TO TIME, BY THE ACTS OF CONGRESS; AND SUCH JURISDICTION BEING LIMITED AND NOT EXCLUSIVE, THAT ADULTERY BETWEEN INDIANS ON AN INDIAN RESERVATION IN THE STATE OF SOUTH DAKOTA, IS NOT SUCH A CRIME AS WAS CONTEMPLATED BY THE ACTS OF CONGRESS; THAT IS TO SAY:

(a) THAT THERE IS NO STATUTE OF THE UNITED STATES WHICH MAKES ADULTERY BETWEEN INDIANS, ON AN INDIAN RESERVATION IN SOUTH DAKOTA A CRIME OR OFFENSE AGAINST THE LAWS OF THE UNITED STATES.

(b) THAT THE JURISDICTION OF THE UNITED STATES COURTS IS NOT EXCLUSIVE ON THE INDIAN RESERVATIONS IN SOUTH DAKOTA.

In the early case of United States vs. Hudson, 7 Cranch, 32; 3 L. Ed., 260, the Supreme Court of the United States, speaking through Mr. Justice Johnson, at the beginning of our history as a nation, settled this principle of law in the following language:

"The course of reasoning which leads to this conclusion is simple, obvious, and admits of but little illustration. All powers of the General Government are made up of concessions from the several states; whatever is not expressly given to the former, the latter expressly reserves. The judicial power of the United States is a constituent part of those concessions; that power is to be exercised by Courts organized for the purpose, and brought into existence by an effort of the legislative power of the Union. Of all the Courts which the United States may, under their general powers, constitute, one only—the Supreme Court—possesses jurisdiction derived immediately from the Constitution and of which the legislative power cannot deprive it. All other courts created by the General Government possess no jurisdiction but what is given them by the power that creates them, and can be vested with none but what the power conceded to the General Government will authorize them to confer."

This interpretation of the law was reaffirmed by the Supreme Court of the United States in re Wilson, 140 U. S., 576, 578; 35 L. Ed., 513, 514. Mr. Justice Brewer, speaking for the Court, states:

"The jurisdiction of the United States Courts over these reservations, and the power of Congress to provide for the punishment of all offenses committed therein, by whomsoever committed, are not open to question. United States vs. Kagama, 118 U. S., 375; 30 L. Ed., 228. And this power being a general one, Congress may provide for the punishment of one class of offenses in one Court, and another class in a different Court. There is no necessity for, and no constitutional provision compelling, full and exclusive jurisdiction in one tribunal; and the policy of Congress for a long time has been to give only a limited jurisdiction to the United States Courts. Section 2145 extends to the Indian country the general laws of the United States, as to the punishment of crimes committed in any place within the sole and exclusive jurisdiction of the United States, except as to crimes the punishment of which is otherwise expressly provided for. This Indian Reservation is a part of the Indian country within the meaning of that section. Bates vs. Clark, 95 U. S., 204; 24 Ld. Ed., 271; ex parte Crow Dog, 109 U. S., 556; 27 L. Ed., 1030. But this extension of the

criminal laws of the United States over the Indian country is limited by the section immediately succeeding, section 2146, as follows: 'The preceding section shall not be construed to extend to crimes committed by one Indian against the person or property of another Indian, nor to any Indian committing any offense in the Indian country who has been punished by the local law of the tribe, or to any case where, by treaty stipulations, the exclusive jurisdiction over such offenses is or may be secured to the Indian tribes respectively.' So that before the act of 1885 the jurisdiction of the United States Court was not sole and exclusive over all offenses committed within the limits of an Indian Reservation. The words "sole and exclusive," in section 2145, do not apply to the jurisdiction extended over the Indian country, but are only used in the description of the laws which are extended to it."

It is deemed unnecessary to make any statement of the laws passed by Congress prescribing the offenses which constitute a crime when committed by one Indian against another Indian on an Indian Reservation, and particularly on an Indian Reservation in South Dakota, as the quotations from the different decisions heretofore and hereafter to be incorporated in this brief, in our opinion, sufficiently enumerate the laws that have been passed.

We venture to suggest, however, that in re ex parte Crow Dog, 109 U. S., 556; 27 L. Ed., 1030, which was decided December 17, 1883, the Supreme Court of the United States held that if Section 2145, R. S., extends the Acts of Congress, Section 5339, punishing murder, to the Indian country, Section 2146 expressly excepts from its operation crimes committed by one Indian against the person or property of another Indian.

This case also held that the Sioux treaty of April 29, 1868, and February 28, 1877, did not limit the express reservations of Section 2146. In other words, it held, in substance, that at that time the Government had no authority to punish any Indian for any offense committed against the person or property of another Indian on an Indian Reservation.

Since that time, Congress has passed the Intoxicating Liquor Act of July 23, 1892, Chapter 234, and amended the same by the Act of June 30, 1897, and the further Act of March 1, 1895, Chapter 145.

In addition to the Intoxicating Liquor Acts, to remedy the condition existing after the decision in the Crow Dog case, supra, Congress, by Section 9 of the Act of March 3, 1885, Chapter 341, passed a law enumerating seven distinct criminal offenses com-

mitted by one Indian against the person or property of another Indian, and providing for the penalty therefor, and granting jurisdiction to the Federal Courts for the trial and punishment of the same. This Act is practically reincorporated in the new Judicial Code, being Section 328 of the Act of March 4, 1909, Chapter 321.

Shortly after the admission of South Dakota as a State into the Union, by Chapter 106, Laws of 1901, the said State ceded the jurisdiction to the Government in criminal cases arising on the Indian Reservations. And Congress, by the Act of February 2, 1903, Chapter 351, passed the following Act, which has been incorporated in, and become Section 329 of the Penal Code of the United States.

"Sec. 329. (Crimes committed on Indian reservations in South Dakota.) The Circuit and District Courts of the United States for the District of South Dakota shall have jurisdiction to hear, try, and determine all actions and proceedings in which any person shall be charged with a crime of murder, manslaughter, rape, assault with intent to kill, assault with a dangerous weapon, arson, burglary, or larceny, committed within the limits of any Indian Reservation in the State of South Dakota. Any person convicted of murder, manslaughter, rape, arson, or burglary, committed within the limits of any such Reservation, shall be subject to the same punishment as is imposed upon persons committing said crimes within the exclusive jurisdiction of the United States: Provided, that any Indian who shall commit the crime of rape upon any female Indian within any such reservation shall be imprisoned at the discretion of the Court. Any person convicted of the crime of assault with intent to kill, assault with a dangerous weapon, or larceny, committed within the limits of any such reservation, shall be subject to the same punishment as is provided in cases of other persons convicted of any of said crimes under the laws of the State of South Dakota. This section is passed in pursuance of the cession of jurisdiction contained in chapter one hundred and six, Laws of South Dakota, one thousand nine hundred and one."

Sections 2145 and 2146 of the Revised Statutes, were not repealed by the Penal Code, and remain in force and effect except as to the limitations placed on Section 2146 by the laws last above enumerated, to-wit: the Intoxicating Liquor Laws, the Act of 1885, which is Section 328 of the Penal Code, and Section 329 of the Penal Code.

There is no doubt that the fact that Crow Dog went unpunished by the Federal Authorities for the murder of Spotted Tail, led to the passage of Section 9 of the Act of 1885, which Act partly repealed the limitations provided for in Section 2146, but this repeal only extended to the crimes therein enumerated. The same rule of interpretation applies to Section 329 of the Penal Code, as it did, and does to the Act of 1885.

Mr. Justice Pitney, in speaking for the Court in the recent case of James Donnelly vs. United States, 228 U. S., 243; 33 Sp. Ct. Rep., 449, on page 458, uses the following significant language in referring to Section 9 of the Act of 1885:

"So far from impliedly repealing Section 2145, R. S., it manifestly repeals in part the limitation that was imposed by Section 2146 upon the effect of Section 2145."

It is the contention of the defendant that the Supreme Court, when it said that it repealed in part the limitation that was imposed by Section 2146, used the words "repealed in part" advisedly and intentionally, and meant thereby that it repealed the limitation of Section 2146 as to the crimes of murder, manslaughter, rape, assault with intent to kill, assault with a dangerous weapon, arson, burglary or larceny, and did not thereby intend to convey that it repealed any other limitation in Section 2146 contained.

Again Mr. Justice Pitney uses the following language:

"It was pointed out by the Court in ex parte Crow Dog, supra, that: 'The provisions now contained in Section 2145 and 2146 of the Revised Statutes were first enacted in Section 25 of the Indian Intercourse Act of 1834, 4 Stat. at L., 733, ch. 161. Prior to that, by the Act of 1796, 1 Stat., at L., 469, ch. 30, and the Act of 1802, 2 Stat. at L., 139, ch. 13, offenses committed by Indians against white persons and by white persons against Indians, were specifically enumerated and defined, and those by Indians against each other were left to be dealt with by each tribe for itself, according to its local customs. The policy of the Government in that respect has been uniform. The point decided was that general expressions in the treaty with the Sioux Indians made in 1868, 15 Stat. at L. 635, had not the effect of impliedly repealing the express limitation contained in Section 2146, as a result, Crow Dog went unpunished by the Federal authority for the murder of Spotted Tail, another Indian. And this no doubt was one of the causes that led to the enactment of Section 9 of the Act of March 3, 1885, 23 Stat. at L., 385, ch. 341, as was

pointed out in United States vs. Kagama, supra, where the 9th section was sustained as valid and constitutional in both its branches; namely, that which provides for the punishment *of the crimes enumerated* when committed by Indians within the Territories, and that which provides for the punishment of the same crimes when committed by an Indian on an Indian Reservation within a State of the Union."

In re ex parte Gon-shay-ee, 130 U. S., 343; 32 L. Ed., 973, page 976, Mr. Justice Miller, speaking for the Court, and referring to the Act of 1885, states:

"That statute evidently intended to provide for the punishment of all cases of *murder, manslaughter, rape, assault with intent to kill, arson, burglary and larceny,* committed by Indians within any Territory of the United States, whether within or without an Indian Reservation, and the declaration is clear that they shall be subject therefor to the laws of such Territory relating to said crimes. . . . . The framers of this Act were very careful, in this part of the statute, where the offense was committed within the territorial limits of a State, to declare that a violation of the laws of the United States in regard to these crimes of murder, etc., should be tried in the Courts exercising the jurisdiction of the United States to punish offenses against the United States."

The Supreme Court of South Dakota, in re State vs. Nimrod, 30 S. D., 239; 138 N. W., 377, which was a case where an Indian had been charged with the crime of bigamy on the Yankton Reservation, and a demurrer was interposed on the ground that the State Court had no jurisdiction, the Supreme Court of South Dakota held:

"An Indian who is amenable to the general laws of the State except where the Acts of Congress, by express provisions, have made the laws of the United States applicable, may be prosecuted in the State Courts for bigamy committed within an Indian Reservation, notwithstanding the Act of February 2, 1903, ch. 351, 32 Stat., 793, conferring on the United States Courts jurisdiction over persons charged with enumerated crimes committed within Indian Reservations, not including bigamy.

And from page 379, we quote the following:

"It will be observed that this Act of February 2, 1903, provides, 'in which any person shall be charged with the crime of *murder,*' etc., thereby making the said Act apply to all persons whomsoever, whether Indians or whites. It does not purport to

be limited to Indians only. There is no distinction between whites and Indians so far as the operation of this law is concerned. We are not prepared to concede that a white man could not be successfully prosecuted for bigamy although committed on an Indian reservation."

The Supreme Court of Minnesota, in re State vs. Campbell, 53 Minn., 354; 55 N. W., 553, uses the following language, where the defendant was indicted for the crime of adultery in the state courts, alleging that the same had been committed on an Indian Reservation.

"The crime is not one of those enumerated in Section 9 of the Act of 1885, ch. 341. . . . . *Presumably Congress has enumerated all the acts which in their judgment, ought to be made crimes when committed by Indians, in view of their imperfect civilization.* For the State to be allowed to supplement this by making every act a crime on their part which would be such if committed by a member of our more highly civilized society, would not only be inappropriate, but practically to arrogate the guardianship over those Indians which is exclusively vested in the General Government."

Precisely the same statement of law is made by the Supreme Court of Oregon in a like case, in State vs. Columbia George, 65 Pac., 604, 607, where the court followed the rule laid down in State vs. Campbell, supra, and quotes it approvingly.

In re Blackbird, 109 Fed., 139, the court says:

"By the Act of March 3, 1885, 23 Stat., 362, Section 9 prescribes what Acts should constitute a crime when committed by tribal Indians on a Reservation within a State, and by what Courts they should be tried therefor, and the jurisdiction so conferred is exclusive."

On page 144, in referring to the Act of 1885, supra, the Court uses the following language:

"It is quite evident that Congress has made all the provisions it deemed necessary for the proper government and control of the Indians. *No doubt, if necessary, Congress would provide for the punishment of lesser crimes committed by the Indians, but so far, with the superintendence that is guarantied, it has not been found necessary.*"

In People ex rel. Cusick vs. Daly, 105 N. E., 1048, decided in 1914, the Court of Appeals of New York, in speaking of Section 9, Act of 1885, now Section 328 of the Penal Code, after quoting said statute, interprets the same as follows:

"The Federal Statute of 1885 was evidently enacted to remedy the conditions which resulted from the decision of the United States Court in ex parte Crow Dog, supra. (Citing Donnelly vs. United States, supra.) In the Crow Dog case it was held that an Indian who had murdered another Indian on the Sioux Reservation in the then Territory of Dakota, would not be punished by the Courts under the Statutes and Treaties as they then existed, and under which offenses committed by one Indian against another were dealt with by each Tribe according to its local customs. (Again citing Crow Dog case.) This enactment superceded the rule laid down in Crow Dog's case, by vesting the Federal Courts with jurisdiction over *such of the more serious crimes as the savage nature of the Indian would lead him to commit, and for the punishment of which the tribal regulations and tribunals were properly regarded as inadequate.*"

In ex parte Hart, 157 Fed., 130, tried in 1907, in interpreting the various Indian laws, the Court uses the following language:

"The provisions of the Revised Statutes, Section 2145, 2146, as amended February 18, 1875, ch. 80, that the general laws relating to the punishment of crimes committed in any place within the sole and exclusive jurisdiction of the United States shall extend to the Indian country, with the reservation that they shall not apply to crimes committed by Indians against the person or property of another Indian, are not affected by any subsequent legislation except by Act of March 3, 1885, which makes certain enumerated crimes committed by Indians against the person or property of another Indian within a territory, either within or without a Reservation, subject to punishment in accordance with the laws of such Territory. Act of March 3, 1887, ch. 397, Section 4, which defines and prescribes the punishment for the crime of Incest, is not therefore in force within an Indian Reservation, where both parties to the alleged act are Indians, and there is no law making such act a crime."

In ex parte Mayfield, 141 U. S., 107; 35 L. Ed., 635, the Supreme Court held that:

"A member of the Cherokee Nation committing adultery with an unmarried woman, within the limits of its Territory, is amenable only to the Courts of the Indian Nation."

In re United States vs. King, 81 Fed., 625, in construing Section 9 of the Act of 1885, supra, the District Court holds:

"The offense of assault with intent to commit rape, committed by an Indian upon an Indian woman, both residing upon

an Indian Reservation, is not cognizable as a crime by any statute of the United States, and the United States Courts have no jurisdiction of such offense."

The Court, in substance, says:

"The Act of 1885, above referred to, providing for the punishment of Indians committing murder and other specified crimes, gave cognizance to the United States Courts when committed within the limits of a reservation in a state. This legislation was considered by the Supreme Court and its constitutionality upheld, in United States vs. Kagama, supra; and, so far as jurisdiction is conferred by that Act, it must be regarded as exclusive. . . . . But the offense charged against this defendant is not provided for in this enactment, nor in any United States Statute."

II.

SECTION 316 OF THE PENAL CODE LEAVES US TO LOOK ELSEWHERE FOR THE DEFINITION OF THE TERM ADULTERY. THE TERM ADULTERY HAS A DEFINITE AND FIXED MEANING AT COMMON LAW AND CONSISTED OF SEXUAL INTERCOURSE WITH A MARRIED WOMAN BY A MAN MARRIED OR SINGLE OTHER THAN HER HUSBAND.

In United States vs. Cardish, 143 Fed., 640, every contention made by defendant as to the interpretation of this law, is sustained. And by the law of that case adultery, even if it had been made one of the offenses enumerated in Section 329 of the Penal Code, could not operate to confer jurisdiction upon the United States Courts to try this defendant for the reason that the common law definition of adultery would prevail, which definition is that "adultery by the common law, consisted of sexual intercourse with a married woman by a man married or single, other than her husband."

2 Corpus Juris, 11.

"The connection of a married man with a single woman does not make him guilty of the crime of adultery at common law."

Note 3, subdivision "A," 2 Corpus Juris, 12.

In re United States vs. Cardish, supra, the District Court in its opinion, stated:

"We may start with the fundamental proposition that there are no common law offenses against the United States. United States vs. Eaton, 144 U. S., 687; 36 L. Ed., 591. In order to sustain this indictment, therefore, we must be able to find some Federal Statute reaching the case, which has been extended over

the Indians resident upon a Reservation, set apart for the occupancy of an Indian Tribe, and conferring jurisdiction upon this Court. The contention of the Government is that this has been done by the Act of March 3, 1885, ch. 341, Section 9, which reads as follows: (Here follows Section 9.) This legislation was a new departure. For the first time Congress undertook to punish an Indian living in a Reservation for a crime committed against another Indian when such Reservation is located within the limits of a State. Its constitutionality was promptly challenged. The Supreme Court, in United States vs. Kagama, supra, upheld the legislation. Thus it appears that the crime of arson, among other offenses, has been by force of this Statute extended over Indian Reservations; and that an Indian committing the crime of arson within the limits of an Indian Reservation, shall be amenable to the same punishment, and tried by the same Courts, as though the crime had been committed within a fort or any other place exclusively under the jurisdiction of the United States. It has been further held that no jurisdiction exists to try or punish an Indian for an offense committed upon a Reservation, which is not enumerated in this Statute of 1885. United States vs. King, 81 Fed., 625; United States vs. Logan, 105 Fed., 240. It will be observed that the Act of 1885 creates no new offense, and imposes no new punishment. It does not define the crime, but simply adopts the common law term 'arson.' So far as this case is concerned the act would be wholly inoperative in the absence of some other Statute of the United States imposing a specific penalty upon the crime of arson when committed within territory exclusively within the jurisdiction of the United States. In other words, the Statute leaves us to look elsewhere for the definition of the term 'arson,' and elsewhere for the punishment. The term 'arson' has a definite, fixed meaning at the common law. The crime of arson has been materially enlarged and subdivided by the legislation of several States, and the burning of other structures than dwelling houses has been made punishable by Federal Statute, of which Section 5386 is an example. Section 5386 imposes a penalty for the malicious burning of any arsenal, etc., not parcel of a dwelling house, or any other building not mentioned in Section 5385, etc. It is on the strength of the section that the defendants are charged with burning a certain building. It is conceded that it would not be arson at common law to burn the structures enumerated in Section 5386. . . . . The rule seems to be well settled that when Congress by statute

refers to or adopts a common law offense, without further definition, the common law definition must obtain. Re Greene, 52 Fed., 104, 111. In 1790 Congress made the crime of manslaughter on the high seas punishable by fine and imprisonment. The Act did not define the crime otherwise than by the employment of the common law term. It was held that the Courts were thus remitted to the common law for a definition. United States vs. Armstrong, 2 Curt., 451; Federal Cases No. 14467. It will be observed that the Supreme Court in the Kagama case, supra, in discussing the Act of 1885, *twice refer to the offenses* enumerated therein as common law crimes.' It is inconceivable that Congress used the common law term intending thereby to cover another distinct and different offense. The statutory offense created by Section 5386 is so radically different that were an indictment framed under it, proof of arson would amount to a variance. . . . . Therefore, I am persuaded that Congress meant by this enactment exactly what it said, nothing more and nothing less. It had in contemplation the well known common law offense. It intended that we should look to the common law for the definition, and should look to the Federal Statutes theretofore enacted for the penalty."

Construing that the jurisdiction of the United States Court was limited to the power therein granted, the crime of adultery falls without the Statute. Adultery not being made a crime herein, the United States Court is without jurisdiction, either of the person, or of the subject matter.

Section 311 of the Penal Code, herein referred to, is very similar to Section 2145, but it does not go to the extent, as did Section 2145, of providing that the general law shall extend to the Indian country. It is to be presumed that this section was incorporated in chapter 13 of the Penal Code, which applies to certain offenses committed within the Territories, and places them within the exclusive jurisdiction of the United States; that had Congress intended to apply chapter 13 to the Indian country, it would have declared the same in express language, as it did in Section 2145.

Congress intended, in the passage of the Act of 1903, supra, as embodied in Section 329 of the Penal Code, to provide for certain offenses committed by persons in the Indian country, no matter of what race or color, and specified eight distinct offenses; *and it is a reasonable presumption, as stated in the Blackbird case, supra, that Congress thought that these were all the*

laws that were necessary for the proper protection of the Indians, and as stated in State vs. Campbell, supra, *presumably congress has enumerated all the Acts which, in their judgment ought to be made crimes when committed by Indians, in view of their imperfect civilization.* And as stated in People vs. Daly, supra, *that it vested the Federal Courts with jurisdiction over such of the more serious crimes as the savage nature of the Indian would lead him to commit, and for the punishment of which the tribal regulations and tribunals were properly regarded as inadequate.*

In the light of the above decisions it seems to us that any attempt on the part of the Government, by strained construction, to maintain its contention that the offense at bar is not a crime against the person or property of an Indian and therefore not within the exceptions made by Sec. 2146 to the operation of Sec. 2145 and for that reason a crime within the jurisdiction of the Federal Courts, is entirely unwarranted and untenable in law. It is not in consonance with the spirit of the Constitution, Statutes or the unbroken line of Federal decisions and is absolutely foreign to the policy pursued by the Government, in its treatment of the Indians and the punishment of their crimes, from its earliest organization to the present day.

When the learned Judges of the District Courts and the State Supreme Courts have held that adultery when committed by Indians upon an Indian Reservation was not a crime under Secs. 2145-2146, how can this Government expect Dennis Quiver, a full blood youth of a savage tribe just beginning to manifest a few faint signs that it is beginning to emerge from the depths of blood-thirsty savagery, be expected to know that adultery is not a crime against the person or property and therefore not within the exceptions of Sec. 2146. To adopt this construction would be to overturn completely the studied efforts of this Government through an unbroken course of a century and a half to extend the helping hand of brotherly love and assistance to their red-skinned brethren in their efforts to emerge from barbarism.

Chapter 14 of the Penal Code, being the chapter in which section 329, supra, is incorporated, is entitled "General and Special Provisions." The special statutes regarding punishment for Indian offenses, must control.

The Circuit Court of Appeals for the Eighth Circuit in Christy vs. United States, 136 Fed., 326, 333, states the law in this respect, to be:

"Specific legislation upon a particular subject is not affected

by a general law upon the same subject, unless it clearly appears that the provisions of the two laws are so repugnant that the legislators must have intended, by the latter, to modify or repeal the earlier Act. The special Act and the general law must stand together, the one as the law of the particular subject, and the other as the general law of the land."

Mr. Justice Matthews, in ex parte Crow Dog, supra, on page 1035 L. Ed., states, approvingly, that:

" 'The legislature having had its attention directed to a special subject, and having observed all the circumstances of the case and provided for them, does not intend, by a general enactment, to derogate from its own act, unless it makes some special mention of its intention to do so.' The nature and circumstances of this case strongly reinforce this rule of interpretation in its present application. It is a case involving the judgment of a court of special and limited jurisdiction, not to be assumed without clear warrant of law. . . . . It is a case where, against an express exception in the law itself, that law, by argument and inference only, is sought to be extended over aliens and strangers; over the members of a community, separated by race, by tradition, by the instincts of a free though savage life, from the authority and power which seeks to impose upon them the restraints of an external and unknown code, and to subject them to the responsibilities of civil conduct, according to rules and penalties of which they could have no previous warning; which judges them by a standard made by others and not for them; which makes no account of the conditions which should except them from its exactions, and makes no allowance for their inability to understand it. It tries them, not by their peers, nor by the customs of their people, nor the law of the land, but by superiors of a different race, according to the law of a social state, of which they have an imperfect conception, and which is opposed to the traditions of their history, to the habits of their lives, to the stronger prejudices of their savage nature."

The court also says:

"To justify such a departure in such a case, requires a clear expression of the intention of Congress, and that, we have not been able to find."

It was a fact well known to Congress, and to every one familiar with Indian history, that until recently, polygamy had been practiced among the Indians, and that the untutored Indian could conceive nothing wrong in adultery. And it is ex-

tremely probable that Congress had this in mind when it failed to make adultery a crime when committed by an Indian with an Indian on an Indian Reservation, either in the Act of 1885, or 1893, supra, which were incorporated in Sections 328 and 329, supra, of the Penal Code.

The jurisdiction of the Federal Court not being exclusive, and being a court of limited jurisdiction, the limitations imposed by Section 2146 of the Revised Statutes, apply except as to the eight specified crimes contained in Section 329, and the Intoxicating Liquor Statutes.

III.

IF THERE IS ANY DOUBT AS TO WHETHER OR NOT ADULTERY BETWEEN INDIANS ON AN INDIAN RESERVATION IN THE STATE OF SOUTH DAKOTA, CONSTITUTES A CRIME, THAT DOUBT SHOULD BE RESOLVED IN FAVOR OF THE DEFENDANT.

In United States vs. Brewer, 139 U. S., 278; 35 L. Ed., 190, 193, the Supreme Court states the law to be as follows:

"Laws which create crime ought to be so explicit that all men subject to their penalties may know what acts it is their duty to avoid. Before a man can be punished his case must be plainly and unmistakably within the statute."

This language was quoted approvingly in the recent case of ex parte Charley Webb, 225 U. S., 663; 32 Sp. Ct. Rep. 769, on page 779, where the court adds the following:

"Ambiguity and uncertainty about the meaning of a criminal statute ought to be resolved by a strict interpretation, in favor of the liberty of the citizens."

This, taken in connection with the language above quoted from the Crow Dog case, together with the decisions of the various State and Federal Courts hereinbefore cited in support of our first proposition, shows, conclusively, that the great majority of courts were of the opinion that only the offenses enumerated constituted crimes, and that, therefore, adultery did not constitute a crime against the laws of the United States.

If such eminent authorities as have been quoted are mistaken as to the interpretation of the law, it certainly would seem as though an untutored Indian, whose condition, antecedents and the past history of whose tribe had always been to the contrary, could not, from a reading of the Statutes, know that it was his duty to avoid the acts complained of in this indictment.

In conclusion, we quote from the language of the supreme

court of Oregon, in the case of State vs. Columbia George, 39 Ore., 127; 65 Pac., 604, to the following effect.

"There is a grave responsibility imposed upon every Court to be very sure that it is the law that condemns and not the Court, except as the correct and impartial instrumentality of the law. . . . . "

Respectfully submitted,

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